No. 98-963

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri; RICHARD ADAMS, PATRICIA FLOOD, ROBERT GARDNER, DONALD GANN, MICHAEL GREENWELL and ELAINE SPIELBUSCH, members of the Missouri Ethics Commission; and ROBERT P. MCCULLOCH, St. Louis County Prosecuting Attorney;

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONERS

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January 11, 1999

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TABLE OF AUTHORITIES

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In the petition, Missouri demonstrated that the holding of the Eighth Circuit was hopelessly in conflict with: 1) a decision of the Sixth Circuit upholding a $1000 contribution limit; 2) a holding of the Ninth Circuit rejecting strict scrutiny for challenges to campaign contributions, 3) this Court's fundamental holding in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), upholding a $1000 campaign contribution limit for national campaigns; and 4) the standard

of judicial review applied by the Court in *California Medical Association* v. *FEC*, 453 U.S. 182 (1981). Instead of addressing these concerns, respondents attempt to short-circuit them by suggesting that this case really rests solely upon the quality and quantity of proof offered by the State in defense of its contribution limits. There are at least three flaws in this analysis that warrant submitting this brief reply.

First, it is impossible to determine the adequacy of the proof without first deciding what is the proper legal standard of proof. Respondents simply skate past that problem, but, by itself, that issue justifies certiorari in this case.

There can be no question that the panel majority concluded that strict scrutiny is the correct standard of judicial review just as prior Eighth Circuit panels had done in *Carver* v. *Nixon*, 72 F.3d 633, 638 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), and *Russell* v. *Burris*, 146 F.3d 563, 568 (8th Cir.), *cert. denied*, 67 USLW 3177 (Nov. 16, 1998). The Eighth Circuit held that this was required by *Buckley*. Oddly, respondents simply ignore this Court's decision in *California Medical Association*, even though petitioners relied heavily upon that decision as clarifying that the proper standard of review for expenditure limits is different than the standard for contribution limits. To compound their error, respondents rely upon *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604 (1996), as setting out the proper analysis, even though that case involves expenditures, which are plainly subject to a higher standard of judicial scrutiny. Indeed, the opinions cited by respondents reveal that the justices recognize that there is a fundamental difference between expenditure limits and contribution limits.

Second, the quality of proof here remains strikingly similar to the evidence relied upon by the Court in *Buckley*. Respondents do not challenge Missouri's characterization of the evidence in *Buckley* as razor-thin; they instead argue that the question of how much proof is enough is not an issue worthy of this Court's review. Of course, that question is vital to every legislative body that has enacted or plans to enact contribution limits. If they must prove actual or perceived corruption in order to avoid having the limits declared unconstitutional, then this Court should make that clear. As matters stand, the quantum of proof throughout the nation is the minimal amount identified in *Buckley*, except in the Eighth Circuit. Thus, respondents' argument about evidence merely begs the question that warrants review; it does not answer it.

Finally, respondents do no more than wish away the problem posed by the requirement of narrowly tailoring. Thus, even if a legislature could demonstrate more convincingly than Missouri has that a significant interest is implicated by some contribution limit, it remains the case that no state can justify a particular limit under the Eighth Circuit's least restrictive means test.

In sum, this case does not turn on any question of evidence. To the contrary, the holding below poses clear legal issues that warrant this Court's attention under the traditional standards applied in granting certiorari—conflicts among the circuits and conflicts with prior decisions of this Court. What respondents ultimately ignore is the overwhelming importance of having the constitutional question raised by the Eighth Circuit resolved before the next election cycle. Even without the profound decisional conflicts, review would be warranted because of the seriousness of the question and the potential disruption of future elections.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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